

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HUGO NELSON MELGAR-GARCIA,	:	
	:	
Plaintiff	:	
	:	CIVIL NO. 1:CV-07-1071
vs.	:	
	:	(Judge Caldwell)
UNITED STATES OF AMERICA,	:	
	:	
Defendant	:	

M E M O R A N D U M

I. Introduction

Plaintiff, Hugo Nelson Melgar-Garcia, filed this action pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, et seq., seeking damages as a result of an alleged assault by federal correctional officers at USP-Lewisburg, Pennsylvania. (Doc. 1, Compl.). Melgar-Garcia, confined at the Coleman Federal Correctional Complex in Coleman, Florida, was formerly incarcerated at Lewisburg.

Presently before the Court is Plaintiff's "Motion for Re-Allegding (sic)". In that motion, Melgar-Garcia reasserts the basic elements of his Complaint, implies that he has not received copies of the documents Defendant filed in connection with its Motion for Summary Judgment, and seeks appointment of counsel. For the following reasons, the Court will direct the Clerk of Court to supply Plaintiff with copies of Defendant's summary-judgment

materials (docs. 16-19), deny Plaintiff's request for counsel, and direct Plaintiff to file opposition to Defendant's summary-judgment motion on or before January 21, 2008.

II. Discussion

A. Motion for Appointment of Counsel

In support of his request for counsel, Melgar-Garcia simply suggests that he "is a prisoner proceeding pro-se, and doesn't have the funds to hire counsel (sic)". (Doc. 20). The Court finds that the facts of case do not warrant appointment of counsel at this time. Hence, Melgar-Garcia's motion for counsel will be denied.

Title 28 U.S.C. § 1915(e)(1) provides that a district court may request an attorney to represent an indigent litigant in a civil case. Under § 1915(3)(1), the court has broad discretion to determine whether appointment of counsel is warranted in a particular case. While a district court may, in its discretion, appoint counsel under 28 U.S.C. § 1915, a prisoner does not have a constitutional or statutory right to counsel in a civil case. *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir. 2002); *Tabron v. Grace*, 6 F.3d 147, 153 (3d Cir. 1993). Additionally, the court has no funds to pay an attorney who may accept appointment (although attorney's fees are available under 42 U.S.C. § 1988 if a plaintiff

becomes a "prevailing party" in the litigation). The United States Court of Appeals for the Third Circuit has stated that appointment of counsel for an indigent litigant should be made when circumstances indicate "the likelihood of substantial prejudice to him resulting, for example, from his probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984).

The initial determination to be made by the court in evaluating the expenditure of the "precious commodity" of volunteer counsel is whether the plaintiff's case "has some arguable merit in fact and law." *Montgomery*, 294 F.3d at 499 (emphasis added). Next, if plaintiff's claims meet this threshold review, other non-exclusive factors to be examined are:

- 1.the plaintiff's ability to present his or her own case;
2. the difficulty of the particular legal issues;
3. the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue investigation;
4. the plaintiff's capacity to retain counsel on his or her own behalf;
5. the extent to which a case is likely to turn on credibility determinations, and;
6. whether the case will require testimony from expert witnesses.

Montgomery, 294 F.3d at 499, *citing Tabron*, 6 F.3d at 155-57.

Following the *Tabron* analysis, this Court will first look at the merits of Plaintiff's case. At this point in the proceedings, the Court must, accept Melgar-Garcia's allegations, which are that he was assaulted in February 2007 by federal correctional staff. However, Defendant's pending motion argues that this Court lacks jurisdiction to entertain Melgar-Garcia's claim due to his failure exhaust administrative remedies under the FTCA. (See Doc. 18, Defendant's Summary Judgment Brief). Whether Plaintiff has properly exhausted his FTCA administrative remedies prior to initiating this action is a simple matter that is well within Melgar-Garcia's ability to address.

An assessment of the remaining *Tabron* claims militates against appointment of counsel. Under *Tabron*, courts should consider "plaintiff's education, literacy, prior work experience, and prior litigation experience." *Tabron*, 6 F.3d at 155. Plaintiff's prior litigation experience supports a finding that, at this point, his educational and financial limitations will not impede his ability to present his claims. Plaintiff is able to clearly communicate his claims to the Court and does not suffer from any obvious impediment that impacts his ability to represent himself. Further, any concern over his own inexperience as a

litigant is unnecessary as his pro se pleadings are given a liberal construction by the Court. *See Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Additionally, although indigent, Melgar-Garcia has not demonstrated that he lacks the capacity to retain pro bono counsel on his own behalf. The Court finds that Melgar-Garcia's position as an inmate, proceeding pro se, does not prejudice him in the pursuit of his negligence claim.

We will issue an appropriate order.

/s/William W. Caldwell
William W. Caldwell
United States District Judge

Date: January 9, 2008

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	:	
Plaintiff	:	
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vs.	:	
	:	(Judge Caldwell)
UNITED STATES OF AMERICA,	:	
	:	
Defendant	:	

O R D E R

AND NOW, this 9th day of January, 2008, it is ordered
that:

1. Plaintiff's Motion (doc. 20) for Re-Allegdging (sic), is DENIED.
2. As Plaintiff's motion, in part, seeks the appointment of counsel, it will be construed, in part, as a motion for appointment of counsel and DENIED without prejudice.
3. The Clerk of Court shall send Plaintiff copies of Defendant's summary-judgment materials (docs. 16-19).
4. Plaintiff shall file a properly supported opposition to Defendant's Motion for Summary Judgment on or before January 28, 2008, or the motion will be treated as unopposed.

/s/William W. Caldwell
William W. Caldwell
United States District Judge